Supreme Court, U.S.
FILED
MAR 30 1998
CLERK

No. 97-1236

In The

Supreme Court of the United States

October Term, 1997

WILLIAM L. PATTERSON,

Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 959,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RONALD L. BLISS
Counsel of Record
BLISS & WILKENS, LLC
Attorneys for Respondent
431 West Seventh Avenue
Suite 202
Anchorage, Alaska 99501
(907) 276-2999

145567

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

TABLE OF CONTENTS

	Page
Table of Citations	ii
Statement of the Case	1
A. Procedural History	1
B. Statement of Facts	2
Reasons for Denying the Writ	12
I. The Evidence Does Not Support Petitioner's Assertion Of Error In The Lower Court's Finding That No Triable Issue Of Fact Supports Petitioner's Claim	12
A. The record shows that Patterson's termination was not wrongful or in violation of the collective bargaining agreement	13
B. Local 959's representation of Patterson was not arbitrary, discriminatory or in bad faith	15
1. Applicable legal standard	15
2. Local 959 did not process Patterson's grievance in an arbitrary or perfunctory manner	15
II. There Is No Conflict Between The Circuits On Any Matter Important To Petitioner's Claim	18
Conclusion	22

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Castelli v. Douglas Aircraft Co., 752 F.2d 1480 (9th Cir. 1985) 17

Chrysler Workers Ass'n v. Chrysler Corp., 834 F.2d 573 (6th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988) 13

Del Costello v. Int'l Bros. of Teamsters, 462 U.S. 151 (1983) 13

Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993) 19, 20, 21

Galindo v. Stoody Co., 793 F.2d 1502, 123 LRRM 2705 (9th Cir. 1986) 15, 16

Garcia v. Zenith Electronics Corp., 149 LRRM 2740 (7th Cir. 1995) 17

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 13

In Re Bresler, 119 B.R. 400 (B.R. E.D.N.Y. 1990) ... 19

Jeltsch v. United Parcel Service, 128 LRRM 2502, 108 Lab Cas (CCH) P10, 446 (S.D.N.Y. 1988) 17

Contents

	Page
Moore v. Bechtel Power Corp., 840 F.2d 634, 127 LRRM 3023 (9th Cir. 1988)	15, 16, 17
Patterson v. Dept. of Agriculture, 880 P.2d 1038 (Alaska 1994), *cert. denied, Patterson v. Matanuska Maid*, 513 U.S. 1127 (1995)	1
Schwartz v. Schwartz, 119 BR 207 (B.A.P. 9th Cir. 1990), *rev'd, In Re Schwartz*, 954 F.2d 569 (9th Cir. 1992)	19
Vaca v. Sipes, 386 U.S. 171 (1967)	15
Statutes Cited:	
11 U.S.C. § 362	19
11 U.S.C. § 362(a)	19
11 U.S.C. § 362(d)	20
29 U.S.C. § 185(a)	12
Rule Cited:	
Sup. Ct. R. 10	12

I

STATEMENT OF THE CASE

A. Procedural History

This is Petitioner's second attempt to gain this Court's review of the facts surrounding the termination of his employment. *See Patterson v. Dept. of Agriculture*, 880 P.2d 1038 (Alaska 1994), *cert. denied, Patterson v. Matanuska Maid*, 513 U.S. 1127 (1995).

Petitioner (hereafter "Patterson") filed his first complaint in this action on April 18, 1988, in the Superior Court for the State of Alaska against Respondent Local 959 and several other defendants. The complaint followed an arbitration decision upholding Patterson's termination. Patterson's claims against the other defendants were resolved against him on summary judgment. He appealed to the Alaska Supreme Court, which affirmed. *Id.* Patterson's first (unsuccessful) petition for certiorari followed. *Id.*

The state court action against Local 959 did not proceed because 959 had been operating under the protection of the United States Bankruptcy Court since 1986. CR 1, Ex. B; Supp. ER at 16; CR 7, Attachment 8; Supp. ER at 19-25.[1] Patterson, therefore, filed an adversary complaint against Local 959 in the Bankruptcy Court. ER 25, Ex. 1, Witt Aff. at ¶ 5. The Bankruptcy Court entered a judgment of abstention March 7, 1994 (CR 1, Ex. D; Supp. ER at 17), thus clearing the way

---

1. Throughout this brief, the following abbreviations are used:

"CR" refers to the Docket Number used by the United States District Court below;

"ER" refers to Petitioner's excerpt of record below; and

"Supp. ER" refers to Respondent's supplemental excerpt of record below.

for Patterson to proceed against Local 959. Local 959 then waived service of the original (1988) complaint, and on March 31, 1994, removed the action to the United States District Court for the District of Alaska. ER 1.[2] Patterson moved to remand. ER 5. The District Court denied the motion, holding that the time for removal did not begin to run until the Bankruptcy Court relinquished jurisdiction. ER 10.

Patterson filed an amended complaint on September 2, 1994 (CR 21; Supp. ER at 26-30) and Local 959 answered October 31, 1994. CR 22; Supp. ER at 31-34. Local 959's first motion for summary judgment (ER 25) was opposed. ER 29. Local 959 replied. ER 37. The Court denied the motion for summary judgment but significantly narrowed the issues. ER 39. Local 959 filed a second motion for summary judgment. ER 40, 43, 44. The District Court granted this motion, resolving the matter. ER 45. Judgment was entered November 7, 1995. ER 46.

On November 22, 1995, Patterson filed a Notice of Appeal with the United States Court of Appeals for the Ninth Circuit. The appeal was fully briefed and oral argument was heard July 17, 1997. The Court of Appeals affirmed the holding of the District Court on August 15, 1997. Petition at A3. On August 29, 1997, Patterson filed a motion for rehearing *en banc*. The motion was circulated to the full Court of Appeals. No judge requested a vote on the suggestion for rehearing *en banc*. Petition at A1-A2. The petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected, on October 2, 1997. Petition at A2.

Patterson then filed the pending petition.

B. Statement of Facts

On April 30, 1986, Patterson was employed by Matanuska Mail, Inc., as a route delivery driver. After reporting to work

2. The Notice of Removal was erroneously dated March 31, 1994.

and picking up his paperwork, he drove directly away from his assigned route. CR 25, Ex. A to Ex. 1 at 34-35; Supp. ER at 42, 43. He drove to the Union offices of Teamsters Local 959, located across town from the location of his first assigned delivery. *Id.* at 37-38; Supp. ER at 45-46. His purpose was a personal errand; he hoped to speak with the Union's secretary/ treasurer, Robert Sinnett. ER 29, Ex. 2 at ¶ 20.[3] As Patterson was leaving the Union office parking lot, his delivery truck was struck by another vehicle. *Id.* at ¶ 23.

After the accident, Patterson completed his deliveries. *Id.* at 38; Supp. ER at 46. Upon his return to the Matanuska Maid plant, he was informed that his employment was terminated. *Id.* at 31, Supp. ER at 39.[4]

Patterson's conduct violated two very clear written work rules authorized by the applicable collective bargaining agreement.[5] The work rules state in relevant part:[6]

---

3. Patterson was not a Union officer, shop steward, representative or agent; he was merely a member of a collective bargaining unit.

4. Patterson was terminated for unauthorized use of company equipment for personal use, gross disobedience and being involved in two automobile accidents within a year involving property damage to others. ER 25, Ex. A to Ex. 2. The collective bargaining agreement governing the terms of Mr. Patterson's employment expressly provided that "the following violations shall be subject to discharge *without*" notice or suspension. Included in the list are two of the violations for which Mr. Patterson was terminated: gross insubordination and unauthorized use of company equipment for personal use. ER 25, Ex. B to Ex. 2 at 23.

5. Article 11, Section 11.15 at 11 authorizes the work rules. ER 25, Ex. B to Ex. 2 at 14.

6. The "Matanuska Maid Dairy Company Work Rules and Regulations" effective December 12, 1985 are attached to the Collective Bargaining Agreement. ER 25, Ex. B to Ex. 2 at 23-28.

SECTION A

The following violations shall be subject to discharge *without* the progressive steps of a warning notice and/or suspension. . . .

5. Unauthorized use of Company equipment for personal use.

. . . .

12. Dishonesty of any kind.

. . . .

SECTION B

The following Work Rules shall be subject to the progressive steps of discipline.

I. ACCIDENTS:

. . . .

c. Involvement in accident with injury or property damage to others:

First Offense — Suspension pending investigation and disciplinary action (including, but not limited to, discharge) if appropriate.

Second Offense — Subject to discharge.

. . . .

> The foregoing Rules and Regulations have been formulated to serve as guideposts for the employees. It is to be understood that in describing certain offenses and the penalties therefore, the Company has not limited the violations for which it may discipline an employee to the offenses covered in these Work Rules and Regulations. The Company may exert discipline in other types of cases should the situation warrant, including, but not limited to, cases where an employee's record shows a pattern of Work Rule violations in two or more areas.

ER 25, Ex. B to Ex. 2 at 23-24.

Patterson violated the dishonesty rule by clocking in to receive wages before running a personal errand. He thus subjected himself to discharge without further warning.[7] Patterson also violated the prohibition against personal use of company equipment. Again he subjected himself to discharge without warning or suspension. The accident in the Teamster office parking lot was also Patterson's second property damage to others, subjecting him to discharge under the clearly articulated progressive steps of discipline.[8] ER 25, Ex. B to Ex. 2 at 24.

Upon learning that his employment was terminated, Patterson returned to the offices of Local 959 and saw Edwin Conyers, the Business Representative assigned to administer the collective bargaining agreement between Teamsters Local 959 and Matanuska Maid. CR 25, Ex. A to Ex. 1 at 31-32; Supp. ER at 39, 40; ER 25, Ex. 2 at ¶ 9. Conyers held a

---

7. The company did not cite to this rule in the discharge letter. ER 25, Ex. A to Ex. 2.

8. The rule is applicable without reference to fault of the driver. ER 25, Ex. B to Ex. 2 at 24 (Section B(I)(c)).

Bachelor of Science and Masters of Education degree from the University of Texas. As of April 30, 1986, he had been employed by Local 959 as a Business Representative for approximately three years. He was trained in grievance/arbitration procedures by Local 959's general counsel and by the training staff of the International Brotherhood of Teamsters. He had attended numerous seminars in grievance/arbitration procedures sponsored by The American Arbitration Association. He had also participated as a panelist in numerous panel arbitrations and had assisted Local 959's legal staff in the preparation and presentation of approximately twelve discipline arbitrations. CR 25, Ex. 2.

Patterson and Conyers discussed the purported reasons for his termination. ER 25, Ex. A to Ex. 1 at 31, 32; Supp. ER at 39, 40. Conyers then called Joe Van Treeck, Matanuska Maid Plant Manager, and arranged to meet with him that afternoon to discuss the Patterson termination. ER 25, Ex. 2 at ¶ 9.

Conyers and Patterson met with Van Treeck and John Seawell, Matanuska Maid's General Manager, on April 30 to discuss the reasons for Patterson's termination. *Id.* at ¶ 10. Conyers attempted to convince Seawell that Patterson was at Local 959's offices that morning for legitimate Union business, that the accident was not Patterson's fault, that property damage had been minimal and that Patterson should not be terminated. Conyers' arguments were not accepted by either Seawell or Van Treeck and they upheld Patterson's termination. CR 25, Ex. A to Ex. 1 at 41; Supp. ER at 48; ER 25, Ex. 2 at ¶ 10. Sometime during the day, Patterson was given a letter informing him he was terminated and stating the reasons for his termination. The stated reasons for his termination were: unauthorized use of company equipment for personal use, gross disobedience, and second accident within a year involving property damage to others. CR 25, Ex. A to Ex. 1, deposition Ex. 2; Supp. ER at 65.

Conyers pursued a written grievance with Matanuska Maid over Patterson's termination. *See* CR 25, Ex. A to Ex. 1, deposition Ex. 3; Supp. ER at 66; ER 25, Ex. 2 at ¶¶ 11, 29 (Affidavit Ex. C). On May 6, Conyers started to prepare for the possible arbitration of Patterson's grievance; he first requested that Patterson sign a release so he could obtain a copy of Patterson's personnel file. CR 25, Ex. A to Ex. 1 at 52 and Ex. 5; Supp. ER at 67; ER 25, Ex. 2 at ¶¶ 12, 30 (Affidavit Ex. D).

On May 6, Conyers received a letter from Seawell requesting a meeting between himself and Sinnett as required by Article 9.05 of the contract. ER 25, Ex. 2 at ¶¶ 13, 31 (Affidavit Ex. E). The meeting to attempt informal resolution on a "principal to principal" basis was held.

On May 12, Conyers was called into Sinnett's office; present in Sinnett's office was Seawell. Sinnett informed Conyers that he and Seawell had reached a tentative resolution of Patterson's grievance, which was a letter of reprimand with a 30-day suspension without pay. Sinnett also informed Conyers that they had agreed to extend the period for informal settlement until June 2. ER 25, Ex. 2 at ¶ 15. Sinnett knew that Patterson was in Conyers office and asked him to bring Patterson in so that he could explain the tentative settlement. When Sinnett, Patterson and Conyers were in Sinnett's office, Sinnett explained the proposed settlement: the termination would be converted to a 30-day suspension without pay with a letter of reprimand. Sinnett advised Patterson to accept the settlement, reasoning that there is always a risk of losing an arbitration and suspension was better than termination. *Id.* at ¶ 16. Patterson was adamant that he wanted his grievance arbitrated. CR 25, Ex. A to Ex. 1 at 53; Supp. ER at 52, Ex. 2 at ¶ 16.

After the tentative settlement of his termination grievance was discussed (30-day suspension without pay with letter of reprimand), Patterson no longer considered himself terminated

from Matanuska Maid. Patterson reached this belief even though he had not worked for Matanuska Maid between April 30 and May 14. Patterson informed Local 959 that if "worse came to worse," he would take the 30 days without pay. CR 25, Ex. A to Ex. 1 at 54; Supp. ER at 53.

In furtherance of this proposed informal resolution, Conyers received from Sinnett a copy of Seawell's May 6 letter with the following handwritten notation:

> Met with Seawell 10 AM, 5/8, to meet again 5/12, 10 AM
>
> ---
>
> Offer of 30 day suspension & letter of reprimand made to Bill Patterson on 5-12-86, 4:45 — Bill wants to go arbitration — will gather material by 5/26/86

ER 25, Ex. 2 at ¶¶ 14, 32 (Affidavit Ex. F).

On May 14, Conyers (959) wrote to Seawell (Mat-Maid) and informed him that Patterson had rejected the settlement offer. *Id.* at ¶¶ 17, 33 (Affidavit Ex. G). On May 20, Conyers received a letter from Seawell confirming the agreement to extend the informal resolution period until June 2 and transmitting to Conyers a copy of Patterson's personnel file. *Id.* at ¶¶ 18, 34 (Affidavit Ex. H).

After receipt of Patterson's personnel file, Patterson and Conyers met and discussed the items in the file, the issues contained in his termination letter and his work history. CR 25, Ex. A to Ex. 1 at 55, 56, 104, 105; Supp. ER at 54, 55, 62, 63. Patterson made daily trips to the Union Hall to meet with Conyers and Sinnett. *Id.* at 42; Supp. ER at 49. Conyers recalls meeting with Patterson one to three times a week between May 2 and June 23. Patterson met with Conyers at the direction of

Sinnett to discuss the merits of his grievance and prepare for arbitration. *Id.* at 96; Supp. ER at 60. During those meetings, Conyers and Patterson discussed the status of his case and the content and importance of various documents. ER 25, Ex. 2 at ¶ 26.

On May 21, Patterson took a routine job call from the Local 959 Dispatch Hall. The employer was Matanuska Maid. Matanuska Maid refused to accept Patterson as an employee and he was told to see the Union Dispatcher, at the Union Hall. Patterson returned to the Union Hall and saw the dispatcher, who provided him a copy of a letter that he had been given by Matanuska Maid. The letter informed Local 959 that Patterson had been terminated for cause and that he should not be dispatched to Matanuska Maid. CR 25, Ex. A to Ex. 1 at 57, 58, Ex. 8; Supp. ER at 56, 57, 68; ER 25, Ex. 2 at ¶¶ 20, 79 (Affidavit Ex. J).

On June 1, Patterson attempted without invitation to report to work at Matanuska Maid. CR 25, Ex. A to Ex. 1 at 75; Supp. ER at 59. Matanuska Maid refused to accept Patterson back. When he refused to leave, Matanuska Maid called the police, who escorted him from the premises and issued a trespass citation. *Id.* at 75, Ex. 13; Supp. ER at 71.

The informal resolution period was set to expire on the next day, June 2, 1992. Patterson decided to approve the settlement he had previously rejected. Sinnett went to work to effect the settlement. He called Seawell at approximately 1:30 p.m. to arrange Patterson's return to work. CR 25, Ex. D to Second Affidavit of John Seawell; Supp. ER at 92. Seawell agreed to June 3, 1992, at 8:00 a.m. *Id.* Sinnett sent a note to Conyers asking him to call Patterson and to tell him to report to work at Matanuska Maid at that time. CR 25, Ex. 2 at ¶¶ 21, 80 (Affidavit Ex. K). Conyers left that instruction on Patterson's telephone recorder. Patterson reported to work and performed work for Matanuska Maid on June 3 and 4. At approximately

4:00 p.m. on June 4, Seawell asked Patterson to sign the letter documenting the settlement of his grievance.[9] Patterson refused to sign, thus rejecting the terms of settlement. Prior to leaving, Patterson spoke with Sinnett by telephone.[10] CR 25, Ex. A to Ex. 1 at 97, Ex. 17; Supp. ER at 74. A meeting was set for the next morning to try to preserve the settlement. That effort failed when Patterson insisted on arbitration. CR 25, Ex. 3 at ¶ 5; Supp. ER at 88.

Beginning May 12, when Patterson first rejected the settlement of his grievance, Conyers prepared to arbitrate. ER 25, Ex. 2 at ¶ 24. He met frequently with Patterson, read appropriate sections in *How Arbitration Works*, by Elkouri and Elkouri, reviewed reported labor arbitration cases for precedent, and reviewed Patterson's personnel file and relevant documents. *Id.* at ¶¶ 24, 25.

During the course of preparing for the arbitration, Conyers and Patterson focused on the issues raised in the April 30

9. The letter was part of the agreed upon settlement, but was not prepared until June 4 because Seawell had surgery on June 3.

10. On Monday, June 2, Sinnett called Seawell and told him that Patterson would accept the 30-day suspension without pay. Sinnett and Seawell discussed when Seawell would prepare and have Patterson sign a letter acknowledging the settlement. Seawell said he could not accomplish that until after his oral surgery scheduled for Tuesday, June 3. On Wednesday, June 4, Seawell and Van Treeck asked Patterson to sign the settlement letter. Patterson refused. Seawell then called Sinnett and explained what happened. Sinnett then set up a meeting for the next morning with Patterson and Conyers. Seawell told Sinnett he would be at the Union offices the next morning and if there was an agreement, get his letters signed. On June 5, when Seawell was arriving at Sinnett's office, Patterson and Conyers were leaving. Conyers informed Seawell that Patterson wanted arbitration. Seawell told Patterson "you are terminated Bill — that's the subject of arbitration, please turn in your uniforms promptly." ER 25, Ex. 1.

termination letter. They discussed Patterson's post-traumatic stress disorder ("PTSD"); Patterson did not relate his termination to his PTSD disorder. Conyers and Patterson also discussed the February 6 letter written by Bevins, (CR 25, Ex. A to Ex. 1, deposition Ex. 19; Supp. ER at 82; ER 25, Ex. 2 at ¶ 31, Affidavit Ex. P), because it was in his personnel file, but Patterson did not inform Conyers that Seawell and Bevins had previously agreed never to use the letter against him.

Conyers' preparation also included interviews with several Matanuska Maid employees. Conyers and Patterson discussed who should be called as witnesses and they agreed to call Matanuska Maid employees Gary Arp, Joe Hogan and Joel Billings. During the course of preparing for arbitration, Conyers gave to Patterson copies of all documents pertaining to his grievance. ER 25, Ex. 2 at ¶ 27.

On June 23, arbitrator Jerry Thorn conducted a hearing on the grievance. Over Conyers' objection, Matanuska Maid introduced the February 6 Bevins letter. Arbitrator Thorn overruled the objection. *Id.* at ¶ 36. Matanuska Maid also introduced testimony concerning obscene telephone calls by Patterson. Conyers objected to this testimony because it was hearsay and not a reason stated in the April 30 termination letter. Arbitrator Thorn allowed the questions. Conyers, after consulting with Patterson, later called Shirley Fallacaro, an alleged recipient of the obscene telephone calls, to rebut the testimony. *Id.* at ¶ 35. Conyers also introduced numerous exhibits on Patterson's behalf. Ten exhibits were introduced to show possible biases and discrimination against Patterson by Matanuska Maid and several were introduced to show Patterson was a valuable employee. *Id.* at ¶ 38.

On July 2, the arbitrator upheld the termination. *Id.*, Ex. S; Supp. ER at 1-15.

REASONS FOR DENYING THE WRIT

Under the standards adopted by this Court, a petition for a writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. No such reason exists here.

I.

THE EVIDENCE DOES NOT SUPPORT PETITIONER'S ASSERTION OF ERROR IN THE LOWER COURT'S FINDING THAT NO TRIABLE ISSUE OF FACT SUPPORTS PETITIONER'S CLAIM

The gravamen of this petition is that the lower court erred in failing to find a dispute of material fact sufficient to bar entry of summary judgment. Patterson complains that:

> The district court and court of appeals weighed the evidence, determined credibility of witnesses and viewed the evidence most favorably to the [Union]. They almost entirely disregarded [Petitioner's] version of the facts, quoted the record out of context and considered the facts in isolation, rather than in their relationship to each other.

A petition should "rarely" be granted on such grounds. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

This is not that rare case where compelling facts might warrant the Supreme Court's review. Patterson's complaint alleged a violation of the duty of fair representation. *See* Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). The District Court and the Court of Appeals, on *de novo* review, correctly held that Patterson failed to show a genuine issue of fact which would support his claim.

Patterson's burden in the Appellate Court was to show that the record reflected a genuine issue of fact whether: (1) his termination was wrongful because it violated the applicable collective bargaining agreement; *and* (2) the Union breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976). Patterson was required to meet *both* prongs of the test. *Chrysler Workers Ass'n v. Chrysler Corp.*, 834 F.2d 573, 582-583 (6th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). As this Court has stated:

> The two claims are inextricably interdependent. "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the union." *Mitchell*, 101 S. Ct. at 1565-1566. . . . The employee may if he chooses, sue one defendant and not the other; but the case he must prove is the same, whether he sues one, the other, or both.

Del Costello v. Int'l Bros. of Teamsters, 462 U.S. 151, 164-65 (1983).

A. The record shows that Patterson's termination was not wrongful or in violation of the collective bargaining agreement

The first prong of the test in evaluating the validity of the hybrid 301 action is whether the plaintiff's termination violated the terms of the applicable collective bargaining agreement. Patterson's action does not meet that test. His discharge was upheld on facts that are incontestable.

The ground for discharge which Patterson challenges is the charge of using company equipment for "personal use." (Appellant's Brief below at 26-27.) Patterson does not challenge

the reasonableness or the enforceability of the rule; nor does he challenge the fact that he broke it. Instead, he claims the rule should not be enforced against *him* because to do so would violate the employer's duty of good faith and fair dealing. He claims there were three other Matanuska Maid drivers at the Teamster's Mall having coffee on April 30, 1986. He concludes that because these three drivers were not dismissed from employment, it is unlawful to fire him. Patterson appears to suggest that the other three drivers (if they exist) were simultaneously in violation of the rule prohibiting personal use of company equipment. It was not, however, against company rules to be present at the Teamster's Mall. CR 29, Ex. 5; Supp. ER at 99-103. There is no evidence that any of these individuals were violating company rules. If they were taking a coffee break and not deviating substantially from their routes, they were not in violation of company rules. *Id.* In contrast, Patterson admits to the personal errand of trying to locate Robert Sinnett. In addition, Patterson drove across town *away from and off his route*, on company time with company equipment to run that personal errand. This was not a coffee break. The fact that others may have been on a legitimate coffee break at a restaurant located in the building Patterson went across town to visit does not make Patterson's conduct rightful or bar his employer from disciplining him for it.

In summary, Patterson does not dispute the fact that he was discharged for a clear breach of a valid written policy which has been incorporated into the collective bargaining agreement. His attempt to excuse his clear breach of the policy against personal use of company equipment falls short of raising a genuine issue. If Patterson means to assert that the company is estopped from enforcing this policy, he fails to so argue. If he means to assert that his conduct is excused because the company tolerated others who violated this policy, he falls short by failing to show either that others have violated it or that the company has tolerated those violations. For these reasons, the Appellate Court correctly affirmed the District Court's judgment in favor of Teamsters Local 959.

B. Local 959's representation of Patterson was not arbitrary, discriminatory or in bad faith

Failure to meet the burden of showing wrongful termination is a sufficient basis for entry of summary judgment. However, here, the second element of plaintiff's cause of action is missing as well. To establish a breach of Local 959's duty of fair representation, Patterson must show not only wrongful termination, but that Local 959's conduct in handling that termination was arbitrary, discriminatory or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). This is a very heavy burden, which Patterson failed to meet.

1. Applicable legal standard

In processing Patterson's grievance, Local 959 would only breach its duty of fair representation if it arbitrarily ignored the grievance or processed it in a perfunctory manner. *Id.* at 191. Local 959 would not breach its duty to Patterson even if it engaged in negligent conduct in processing his grievance. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513-1514, 123 LRRM 2705 (9th Cir. 1986). To violate Patterson's right to fair representation, Local 959 would have to have acted in "reckless disregard" of his rights. *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 127 LRRM 3023 (9th Cir. 1988). That did not occur.

2. Local 959 did not process Patterson's grievance in an arbitrary or perfunctory manner

The Union has broad discretion in handling a grievance. *Id.* at 636. It is not mandatory and not usual to process a grievance through an arbitration hearing. However, once notified that Patterson was going to be terminated, Local 959 promptly met with the company, filed a grievance on Patterson's behalf, pursued settlement possibilities, and aggressively processed the grievance through arbitration.

In *Galindo v. Stoody Co.*, *supra*, the Ninth Circuit overruled a District Court's finding that the Union breached its duty of fair representation by investigating and presenting a grievance to an arbitrator negligently. As the record reflects, Local 959 aggressively pursued the grievance. Local 959 met frequently with Patterson to prepare for the arbitration; it conducted a significant investigation into the merits of the grievance and zealously pursued the actual arbitration.

Patterson's argument does not correctly compare the conduct against the legal standard. Patterson neither cites nor discusses *Moore v. Bechtel Power Corp.*, 840 F.2d 634 (9th Cir. 1988). In *Moore*, the Ninth Circuit considered whether the Union had breached the duty of fair representation when it refused to take two claims of wrongful discharge to arbitration. The case involved two employees, both of whom were assigned to work in different areas where radiation might have been present. Each refused and asked to be assigned to non-radiation areas. Both employees were terminated. The Union unsuccessfully processed grievances for both through a multi-step process. The Union did not proceed to the final step - arbitration in either case; the members then sued for breach of the duty of fair representation. The Court of Appeals noted that it had construed the unfair representation doctrine to protect the broad discretion which has been vested in unions to act in what they perceive to be their members' best interests. *Id.* at 636. To accomplish this, the court is required to examine whether a member is challenging the Union's judgment. If so, the member must prove discriminatory or bad faith conduct:

> If it is a union's judgment that is in question, as it is in this case, a plaintiff may prevail only if the union's conduct was discriminatory or in bad faith. Arbitrariness alone would not be enough. Only when the challenged conduct was procedural or ministerial does arbitrariness become controlling.

Id. at 636 (citations omitted). The court further observed that Ninth Circuit law also requires the plaintiff to show that the alleged breach of duty "prejudices a strong interest of the employee." *Id.*

It is not enough for Patterson to second guess Local 959's handling of the grievance. He must show the conduct was discriminatory or in bad faith and he must show the conduct prejudiced a strong interest. Here, as in *Bechtel*, Patterson challenges the Union's judgment. He does not present a claim that the Union missed time limits or was guilty of some other ministerial act or omission that might support a claim the Union acted arbitrarily.

Local 959 made the best of a very weak claim that Patterson had been wronged by his employer. It twice settled the case on terms that would have reinstated Patterson to employment. He elected to pursue arbitration. Although Patterson complains the grievance was presented by Mr. Conyers rather than the Union's general counsel or secretary/treasurer, he does not produce evidence that this was a decision made in bad faith or with discriminatory intent. The cases have firmly established that the Union has no duty to supply an attorney to assist a grievant in arbitration. *See Jeltsch v. United Parcel Service*, 128 LRRM 2502 n.10, 108 Lab Cas (CCH) P10, 446 (S.D.N.Y. 1988), *citing Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480 (9th Cir. 1985) ("It is for the Union to decide the circumstances under which an attorney will be supplied to a grievant . . . . Where a Union representative assists an employee at arbitration, the Union's failure to provide the employee with an attorney is not a breach of the duty of fair representation."). *See also Garcia v. Zenith Electronics Corp.*, 149 LRRM 2740 (7th Cir. 1995) (noting Union's decision in handling grievance procedures includes right to limit role of outside attorneys on behalf of grievant and that employee is not entitled to be represented by someone other than Union representative in arbitration proceedings).

Moreover, Patterson does not show that Mr. Conyers' representation harmed any of his interests. Mr. Conyers prepared at length, he met several times with Mr. Patterson, he called every witness Patterson wanted and argued every issue Patterson wanted to try. A review of the arbitrator's decision leaves no room to conclude another advocate could have done more for Mr. Patterson.

Patterson complains both about the evidence produced at arbitration and the evidence not produced. He complains about the handling of settlement negotiations and the failure to be present when a disciplinary letter was first shown to Patterson, on the grounds that the Union should have known the psychiatric state of Patterson was such that he would respond poorly to the letter. These are all matters of judgment. No evidence of discriminatory or bad faith motives is presented in connection with any of this generalized second guessing. Nor does Patterson show how the result of the arbitration would have been different had the trial been conducted the way he now thinks it should have been. The arbitrator's decision sets forth the factual foundation and the reasoning for the arbitrator's result. The facts are true and the reasoning is sound.

On the foregoing record, the District Court concluded, and the Court of Appeals affirmed, that "a jury action reasonably could not find that the Union acted recklessly or acted in bad faith in managing the arbitration in the manner that it did." ER 45. The affidavits and other evidence submitted by the parties, together with the applicable legal authorities, solidly support that decision.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON ANY MATTER IMPORTANT TO PETITIONER'S CLAIM

For the purpose of gaining this Court's review, Petitioner asserts that a conflict exists between the United States Courts of

Appeals on a legal issue important to his claim. He argues that a handful of cases have regarded actions taken in violation of the automatic stay of bankruptcy as voidable, rather than void, as such actions are regarded in the Ninth Circuit.[11]

However, Patterson errs in concluding that this distinction is material to his claim. Whether action taken in violation of a bankruptcy stay is deemed void or voidable, the courts agree that such actions are invalid. *See Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 908-09 (6th Cir. 1993).[12] In short, the "conflict" on which Patterson relies is merely a variance in terminology;[13] there is no disagreement on the legal effect of the relevant facts.

The operative facts regarding the removal of this case were not contested below. Local 959 filed a voluntary petition under Chapter 11 of the Bankruptcy Code on August 18, 1986. ER 7, Ex. A. Patterson filed suit in state court, serving Local 959 on May 11, 1988, in violation of the automatic stay effected by

---

11. The filing of a bankruptcy petition automatically stays all action against the debtor or property of the debtor. Specifically, this includes the commencement, including the issuance or employment of process, of a judicial proceeding against the debtor. 11 U.S.C. § 362(a). Thus, both Patterson's initial judicial filing and his service of process against Local 959 were in violation of the automatic stay. Pursuant to 11 U.S.C. § 362, the Superior Court for the State of Alaska entered an order recognizing the statutory stay of the proceeding against Local 959. CR 7 at 25; Supp. ER at 25.

12. Those cases which have treated actions taken in violation of the stay as voidable have done so in recognition that the Bankruptcy Court, on appropriate motion, may by judicial order retroactively lift the stay as to certain acts. *See, e.g., Schwartz v. Schwartz*, 119 BR 207 (B.A.P. 9th Cir. 1990), *rev'd, In Re Schwartz*, 954 F.2d 569 (9th Cir. 1992); *In Re Bresler*, 119 B.R. 400 (B.R. E.D.N.Y. 1990).

13. *See* discussion, *infra* at n.14.

11 U.S.C. § 362(d). ER 5, Return of Service. Patterson pursued his claim in the Bankruptcy Court by adversary complaint dated April 29, 1991, Case No. 3-86-00470, Adv. No. 3-86-00470-001. ER 1 at 3, ER 25, Ex. 2. The Bankruptcy Court abstained from exercise of Bankruptcy Court jurisdiction and granted Patterson relief from stay in an order dated March 1, 1994, filed March 7, 1994. CR 1, Ex. D; Supp. ER at 17-18.

Local 959 waived service of process of Patterson's state court complaint and removed the case to U.S. District Court. ER 1. Patterson challenged the removal in the District Court and in the Court of Appeals. He argued that the removal was untimely because it did not occur within 30 days of the filing of his 1988 complaint in state court, even though the matter was removed within 30 days after the Bankruptcy Court granted relief from stay.

The District Court held that the removal was timely, and the Court of Appeals affirmed. The Court of Appeals, citing *Easley v. Pettibone Michigan Corp.*, 990 F.2d at 908-09, held,

> If an automatic stay is in effect at the time the plaintiff files a state court action [which was the situation here], the thirty-day period for removal does not begin to run until relief is obtained from the automatic stay.

Petition at A8.

Research reveals *no* Circuit which has adopted a conflicting rule, and Petitioner has cited none. Whether or not actions taken in violation of the stay are termed "void" or "invalid" or "voidable," the result in this case is the same.[14] Local 959 did

---

14. The *Easley* opinion noted that "[a] majority of the circuits [including the sixth] have held that actions taken in violation of the automatic stay are void" and that the Fifth Circuit was "alone in (Cont'd)

not waive its right to remove Patterson's claim because the removal petition was filed within 30 days of the date on which the stay was lifted. *See Easley*, 990 F.2d at 908 (By operation of the automatic stay, the commencement of a post-petition action against a debtor, "whether void or voidable," does not take place for removal purposes until the stay is lifted.).

As the court below correctly held, whether the filing and service of Patterson's complaint was void or voidable, Local 959 could not file its removal petition until the Bankruptcy Court lifted the stay. *Cf. Easley*, 990 F.2d at 908 ("actions filed in violation of the automatic stay are removable once the stay is lifted, if only to have a federal court declare that the action is void."). There *is* no conflicting authority requiring a bankrupt to respond to a post-petition state court lawsuit brought against it. As the court below noted, Petition at A8, a contrary rule would vitiate one of the key protections offered by the Bankruptcy Code, which is protection from proceedings brought by creditors.

(Cont'd)

explicitly holding that actions taken during the pendency of the stay are voidable." However, as the court went on to note, the focus should be on the procedural defect at issue, and not on the adjective used to describe it. The words void and voidable

> are not synonyms, however, they are often used interchangeably and imprecisely. "There is great looseness and no little confusion in the books in the use of the words void and voidable, growing, perhaps, in some degree, out of the imperfection of the language, since there are several kinds of defects which are included under the expressions void and voidable, while there are but two terms to express them all."

Id. at 909 (citations omitted). Ultimately, the *Easley* court rejected both terms, finding, " 'invalid' a more appropriate adjective to use when defining an action taken against a debtor during the duration of the automatic stay." *Id.*

In sum, Petitioner seeks review of a "conflict" which does not exist. Petitioner is challenging a Ninth Circuit opinion which is based on settled law and sound public policy. There is no reason, compelling or otherwise, for this Court to grant Patterson's petition.

CONCLUSION

For the foregoing reasons, the pending Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RONALD L. BLISS
Counsel of Record
BLISS & WILKENS, LLC
Attorneys for Respondent
431 West Seventh Avenue
Suite 202
Anchorage, Alaska 99501
(907) 276-2999